IN THE

Supreme Court of the United States

October Term, 1976

No. 76-101.

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

No. 76-205.

THE HONORABLE SHIRLEY CHISHOLM, NATIONAL ORGANIZATION FOR WOMEN, and OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

BERNARD G. SEGAL,
JEROME J. SHESTACK,
DEENA J. SCHNEIDER,
Attorneys for Respondent National Broadcasting Company, Inc.

Of Counsel:
SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pennsylvania. 19102

CORYDON B. DUNHAM,
30 Rockefeller Plaza,
New York, New York. 10020

HOWARD MONDERER,
1800 K Street, N.W.,
Washington, D. C. 20006

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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BRIEF FOR RESPONDENT NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Federal Communications Commission (the "Commission") was issued on September 30, 1975 and is reported at 55 F. C. C. 2d 697 (1a-22a). The opinion of the United States Court of Appeals for the District of Columbia Circuit (the "court below") affirming the action of the Commission was issued on April 12, 1976 (23a-126a). Petitions for rehearing and rehearing *en banc* were denied on May 13, 1976 (127a-131a).

QUESTIONS PRESENTED.

(1) Did the Commission abuse its discretion by issuing an interpretation of the Communications Act of 1934 holding that under certain conditions broadcasts of debates between political candidates and press conferences of political candidates may qualify as "on-the-spot coverage of bona fide news events" under Section 315(a)(4) of the Act?

(2) Did the Commission abuse its discretion by issuing a declaratory ruling interpreting Section 315(a)(4) rather than engaging in formal rulemaking?

STATEMENT.

National Broadcasting Company, Inc. ("NBC") files this brief in opposition to the petitions for writ of certiorari filed in No. 76-205 by the Honorable Shirley Chisholm, the National Organization of Women, and the Office of Communication of the United Church of Christ, all of whom are represented by the Media Access Project ("MAP"), and in No. 76-101 by the Democratic National Committee ("DNC"). NBC intervened in the court below in support of the Commission's decision.

The Commission's ruling, which petitioners challenge, is simply that under certain conditions broadcasts of political candidates' press conferences and debates which are presented because of the broadcaster's reasonable good faith judgment that they are newsworthy may qualify as "on-the-spot coverage of bona fide news events," and thereby be exempt from the equal time requirement of Section 315(a) of the Communications Act of 1934.[1]

Petitioners claim that the exemption in Section 315 (a)(4) for "on-the-spot coverage of bona fide news events" does not encompass broadcasts of debates or press conferences of political candidates even if considered newsworthy by the broadcaster. The court below rejected this contention, noting that as a matter of common sense political candidates' debates and press conferences are newsworthy events:

> "It seems beyond dispute from a commonsensical point of view, that the presidential press conference is an important news event. Such conferences are regularly printed in the newspapers—indeed, the *New York Times* regularly prints a transcript of each Presidential press conference. . . . Debates between major candidates are also 'news' in this respect . . ." (42a n. 20).

1. Section 315(a) of the Communications Act contains, *inter alia*, an exemption from the general equal time requirement for "(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)."

The court below thus found, in effect, that the plain reading of the exemption contained in Section 315(a)(4) required the Commission's ruling without regard to the legislative history. The court below also held that the Commission's ruling was not contrary to the legislative history of the Section 315(a) exemptions, as petitioners have consistently contended (see, *e.g.*, DNC petition at 15, MAP petition at 7-8), since the 1959 enactment of the Section 315(a) exemptions reflected a clear congressional determination to relax the equal time requirement to permit broadcasters greater ability to cover news of political events (9a, 16a, 26a; *see also* **Hearings on Political Broadcasts—Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce,** 86th Cong., 1st Sess. 2 (1959) (comments of Chairman Harris), quoted at 2a, 28a).[2] In affirming the Commission's ruling, the court below specifically rejected petitioners' argument that the exemptions were intended to be construed narrowly:

> "We also find petitioners' argument that the four exemptions were intended to be narrowly construed unsupported by the legislative history. Rather, we find more convincing the Commission's, and Aspen's, contention that the purpose of the 1959

2. Petitioners misread the opinion of the court below when they suggest that the court agreed with their interpretation of the legislative history but affirmed the Commission because it felt compelled to defer to the agency determination (DNC petition at 12, MAP petition at 6).

amendment was broadly remedial, and evidenced a willingness by Congress to take some risks with the equal time philosophy in order to permit broadcast coverage of on-the-spot news and to enable broadcasters more fully to cover the political news. Admittedly, Congress intended that the 1959 amendments would preserve the basic philosophy behind the equal time requirement. At the same time, however, Congress was determined to increase broadcaster discretion and allow increased live broadcast coverage of political news." (40a-41a) (footnotes omitted).[3]

Both the Commission and the court below also emphasized that Congress intended the Commission to play an important role in developing the scope of Section 315 exemptions (3a, 9a, 14a, 16a n. 20, 26a, 37a-39a, 40a, 45a, 47a, 49a, 50a, 53a, 54a, 56a, 58a). Thus the court stated:

> "It is clear . . . that Congress intended to give the Commission some leeway in interpreting the four exemptions and in applying them to particular program formats in order to further the basic purpose of the amendment, '[To] enable what probably has become the most important medium of political information to give the news concerning political races to the greatest possible number of citizens, and to make it possible to cover the political news to the fullest degree.' That the Commission has considerable discretion in this area is clear from the Senate Report . . . [quoting from S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959)]" (37a-38a) (footnote omitted).[4]

3. Other references in the opinions below to the expansive nature of the exemptions appear at 12a, 15a, 26a, 37a, 40a, 41a, 45a, 53a, and 58a.

In this regard the court below underscored the agency's finding that its new ruling would serve the public interest "by allowing broadcasters to make a fuller and more effective contribution to an informed electorate" (35a, quoting from 10a), and thus accomplish the very result Congress hoped to achieve by the enactment of the exemptions.[5]

The court below also dealt with the procedural contention advanced by petitioner MAP that the Commission should have engaged in formal rulemaking rather than issuing the declaratory ruling which is at issue here (MAP petition at 15-18). The court noted that an administrative agency is permitted to correct an error in its interpretation of a statute (54a) and that "the choice whether to proceed by rulemaking or adjudication is pri-

4. The legislative intent to allow the Commission great discretion in developing the scope of the exemptions was evident from the congressional decision "not to legislate in detail, but rather to set out broad categories for exemption of news-related coverage and leave the Commission with the task of implementing Congressional intent." (38a).

5. The court below also dealt with petitioners' general contention that congressional failure to overrule the Commission's decisions in **The Goodwill Station, Inc. (WJR)**, 40 F. C. C. 362, 24 P & F Radio Reg. 413 (1962), **National Broadcasting Company, Inc. (Wyckoff)**, 40 F. C. C. 370, 24 P & F Radio Reg. 401 (1962), and **Columbia Broadcasting System, Inc.**, 40 F. C. C. 35, 3 P & F Radio Reg. 2d 623 (1964), demonstrated the correctness of those decisions and imbued them with the force of law (MAP petition at 10-11 n. 10, DNC petition at 15). On this point the court stated that the legislative failure to overrule these earlier decisions "sheds little light on Congress' intent, other than to demonstrate adherence to the basic philosophy of the equal time requirement, since such inaction must be viewed against the background of Congress' decision to leave the Commission some discretion to decide which particular events should qualify for the broadly defined news coverage exemptions." (49a-50a). *Compare* **Sierra Club v. EPA,** No. 74-2063 (D. C. Cir. August 2, 1976) (Slip Opinion at 23-24).

marily one for the agency regardless of whether the decision may affect agency policy and have general prospective application" (55a).[6]

The opinion of the court below was handed down on April 12, 1976 and petitions for rehearing or rehearing *en banc* were denied on May 13, 1976. On July 23, 1976, DNC filed its petition for certiorari requesting "that the matter be heard on an expedited basis." (DNC petition at 2). MAP's petition for certiorari similarly urges expedition (MAP petition at 18). Nevertheless, MAP waited 90 days from the last action of the court below before filing its petition. On September 1, 1976 DNC withdrew its formal motion to expedite on the ground that "the matter cannot be fully and adequately briefed in the short period remaining before the date of election."

6. The court had noted earlier in its opinion the congressional intent to give the Commission full flexibility and discretion to interpret the new exemptions by means of rulings in individual cases as well as by formal rule-making (37a-39a, 40a-50a, 53a). In its petition DNC also concedes that it is "Commission practice" to handle questions "by interpretive rulings on a case-by-case basis" to be later "collated and published by the Commission in the Federal Register as a guide and outline." (DNC petition at 5).

ARGUMENT.

I.

The Commission's Ruling Involves Only a Narrowly Confined Interpretation Which Is Clearly Within Its Regulatory Authority.

That the Commission ruling which is challenged here may have high political visibility because this is an election year does not, of course, enlarge the dimension of the legal issue involved.

The legal issue remains the narrow one of whether the Commission abused its discretion to interpret the Communications Act by issuing the carefully-conditioned, narrow interpretive ruling challenged here. Section 315(a)(4) of the Communications Act exempts from equal time requirements "on-the-spot coverage of bona fide news events." Specifically, the Commission decided only that broadcasts of political candidates' debates and press conferences which present the following factual situation are covered by this provision:

(a) the event is initiated by non-broadcast entities;

(b) the event is covered "live" and, in the case of a press conference, in its entirety by the broadcaster;

(c) the broadcaster determines that the event is a bona fide news event and is worthy of presentation;

(d) there is no evidence of broadcaster intent to carry the event for the purpose of favoring a particular candidate.

The narrowness of the Commission's ruling is highlighted by the fact that neither the ruling itself nor its affirmance by the court below serves to resolve many other possible related questions in this area, such as whether debates which are instituted by broadcasters might qualify as "bona fide news events," or whether excerpts of press conferences can also qualify. The exact scope of Section 315(a)(4) will continue to evolve from agency rulings on specific complaints challenging a broadcaster's exercise of discretion and by further interpretations as additional experience is garnered. Under these circumstances, there is hardly any pressing need for this Court's review of this particular ruling.

Petitioners assume that reversal of the Commission's ruling will increase coverage of minority parties and fringe candidates (MAP petition at 13). But petitioners have failed to demonstrate any basis for such an assumption. As the Commission and the court below both recognized, historically the result of the Commission's restrictive **Goodwill Station, Wyckoff,** and **CBS** rulings was not to increase coverage of minority parties and candidates, but to discourage broadcasters from covering as news events press conferences and debates during election years to the extent that candidates were involved, particularly where there was a significant number of fringe candidates (10a, 14a, 31a). Indeed, had the Commission not reversed those rulings, the currently scheduled debates between the two major presidential candidates would not be televised because a dozen or more fringe candidates might each have to receive a corresponding allocation of time, an allocation that would be totally unwarranted and impractical and one which broadcasters could not be expected to make. As is well known, before the Commission's reversal of **Goodwill Station, Wyckoff** and **CBS** there was

no live complete network coverage of national candidates' press conferences or debates occurring in a presidential election year.

The Commission's ruling, of course, does not mean that minority candidates and fringe parties are excluded from network coverage. On the contrary, to the extent that minority candidates and fringe parties participate in newsworthy events, they qualify for the Section 315(a)(4) exemption and thus may obtain exposure they would not have should the exemptions be interpreted restrictively. Surely, any claims that the ruling will cause some monumental decrease in broadcast access of minority parties and fringe candidates for newsworthy events must be regarded as highly fanciful, not borne out by the record in this case or by reasoning or experience.

In any event, these claims are hardly now appropriate for resolution by this, or any other Court. As the court below stated, "this case involves issues in an intensely political area which this court enters with great reluctance. *It is the job of the Commission, in the exercise of its delegated authority, and ultimately of Congress, to make these kinds of front-line determinations.*" (59a) (emphasis added).

II.

The Commission's Decision to Issue a Declaratory Ruling Rather Than Engage in Formal Rulemaking Was Within Its Discretion.

Petitioner MAP also seeks review of a purely procedural matter: whether the Commission should have en-

gaged in formal rulemaking with notice and invitation to comment, rather than issuing its decision in the form of the declaratory ruling challenged here [7] (MAP petition at 15-18).

This issue is rather abstract and technical, certainly as to petitioners, both of whom presented their viewpoints to the Commission twice—once prior to the Commission's decision and once in petitions to the Commission for a stay. As the court below succinctly said:

> ". . . [W]e believe the issues were fully aired before the Commission, which had the benefit of all arguments raised before this court. It is therefore difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information available to the Commission or change its decision. The only result would be delay while the Commission accomplished the same objective under a different label. Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments. *Cf. Banzhaf v. FCC*, 132 U. S. App. D. C. 14, 36, 405 F. 2d 1082, 1104 (1968), *cert. denied*, 396 U. S. 842 (1969)." (56a-57a) (footnote omitted).

In any event, this procedural contention is without merit. In enacting the 1959 amendments to Section 315, Congress deliberately refused to legislate "in complex detail" but chose rather to delegate to the Commission the task of implementing the statutory intent by the issuance of *both* general policy guidelines *and* specific rulings. 105 Cong. Rec. 16227 (1959) (remarks of Rep. Celler); *see also* 105 Cong. Rec. 14455 (1959) (remarks of Sen. Pastore).[8] Such duality is not new in the regulatory field. As the court below observed (55a), administrative agencies frequently exercise their discretion in choosing among the procedures available to them, sometimes making particular case adjudications, sometimes issuing declaratory rulings and sometimes issuing broad policy guidelines. See **NLRB v. Bell Aerospace Co.,** 416 U. S. 267, 290-295 (1974); **NLRB v. Wyman-Gordon Co.,** 394 U. S. 759, 772 (1969) (Black, J., concurring); **SEC v. Chenery Corp.,** 332 U. S. 194, 201-203 (1947).

The declaratory interpretation is a particularly appropriate procedural device here and has ample precedent since the Commission's earlier decisions on this subject in **Goodwill Station, Wyckoff** and **CBS** were also rendered without a rulemaking proceeding.[9] There has been no dearth of comment here by interested parties and petitioners can claim no prejudice to them or surprise at the Commission's utilization of an accepted Commission procedure. Under the circumstances, it is clear that this issue is not one meriting review.

7. DNC does not argue this point but rather appears to concede that it is incorrect. See footnote p. 6 *supra.*

8. See also S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959): "As experts in the field of radio and television, the Commission has gained a workable knowledge of the type of programs offered by the broadcasters in the field of news, and related fields. Based on this knowledge and other information that it is in a position to develop, the Commission can set down some definite guidelines through rules and regulations *and wherever possible by interpretations.*" (emphasis added)

9. The **CBS** decision was itself a declaratory ruling, as were the decisions in **KWYX Broadcasting Co.,** 19 P & F Radio Reg. 1075, *aff'd sub nom.* **Brigham v. FCC,** 238 F. 2d 828 (5th Cir. 1960), and **In Re Petition of United Way,** – F. C. C. 2d –, FCC Mimeo 75-1091 (September 25, 1975). Indeed, the decision in the so-called *"Lar Daly"* case, **Columbia Broadcasting System, Inc.,** 18 P & F Reg. 238, *reconsideration denied,* 26 F. C. C. 715, 18 P & F Radio Reg. 701 (1959), which led to the adoption of the Section 315 exemptions, was itself a reversal of prior policy without any rulemaking procedure and was entitled "an interpretive opinion." 26 F. C. C. at 715.

CONCLUSION.

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD G. SEGAL,
JEROME J. SHESTACK,
DEENA J. SCHNEIDER,
Attorneys for Respondent National Broadcasting Company, Inc.

Of Counsel:
SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pennsylvania. 19102

CORYDON B. DUNHAM,
30 Rockefeller Plaza,
New York, New York. 10020

HOWARD MONDERER,
1800 K Street N.W.,
Washington, D. C. 20006